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BRIEF FOR DISTRICT RESPONDENTS IN OPPOSITION

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-687

CHRISTIAN CAMENISCH, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether considerations of comity ingrained in the District of Columbia Court Reform and Criminal Procedure Act of 1970 require that the federal courts of the District of Columbia defer ot the newly created local court system in matters involving the compensation claims of local attorneys (petitioners herein) arising under the Criminal Justice Act.

2. Whether, in the absence of a statutory or contractual property interest in a specific compensation rate for appoin-

tive legal services, the respondent Superior Court judges acted in accordance with procedural due process in declining to afford hearings to petitioners before reducing their compensation below the maximum amounts fixed by the Criminal Justice Act.

STATEMENT

Petitioners are seven attorneys appointed by judges of the Superior Court of the District of Columbia under the Criminal Justice Act (18 U. S. C. § 3006A, hereinafter "the CJA"), to represent indigent defendants in criminal cases. Respondents are the United States, and the Chief Judge and four associate judges of the District of Columbia Superior Court (the latter hereinafter "the District respondents"). Petitioners, on behalf of themselves and approximately nine hundred other attorneys similarly situated, filed an action in the District Court alleging that reductions in the amounts of their claimed compensation under CJA constitute a breach of contract and violate the Fifth Amendment. Petitoners invoked the District Court's jurisdiction as to the District respondents under 28 U. S. C. § 1331. (App. 2a, 10a.)

Petitioners provided representation under the Act by appointments between February 1, 1971, and October 4, 1973—the date their action was instituted. They alleged that the established practice, custom, and usage in the Superior Court with respect to CJA claims is to compensate attorneys at the rate of twenty ($20.00) per hour for out-of-court time, and thirty ($30.00) per hour for in-court time, and that these rates are substantially less than the prevailing rates charged by members of the District of Columbia bar for similar services to nonindigent clients. They further alleged that, in cases disposed of before trial, compensation claims are processed by the "Judge in Chambers," an assignment rotated among the various judges. Given the rotation system, there is said to be no assurance

that the judge passing on the compensation claim will have had prior contact with the case. Petitioners also alleged that their CJA claims have recently been drastically reduced, and that these reductions were accomplished in an arbitrary and capricious manner, without notice and opportunity to be heard. (App. 3a, 9a.)

Petitoners sought money damages against the United States in the amount of the difference between filed claims based on the maximum rates and the claims actually allowed. They sought injunctive relief against the District respondents, requiring the promulgation of regulations prohibiting the future reduction of claimed compensation to an amount less than the maximum provided for in the CJA, or, in the alternative, the adoption of a procedure whereby compensation claimed under the CJA cannot be reduced without notice and hearing (App. 3a; amended complaint at 10-11).

The District Court granted the motions of the Federal and District respondents to dismiss petitioners' action (App. 2a), and the Court of Appeals affirmed, with one judge dissenting (App. 1a through 14a). Following the denial of their petition for rehearing and suggestion for rehearing en banc, petitioners filed in this Court a petition for a writ of certiorari.

REASONS FOR DENYING THE WRIT

Petitioners advance no ground for review conceivably falling within the standards and considerations governing review on writ of certiorari prescribed by Rule 19 of the Rules of this Court. And see *Fields* v. *United States*, 205 U. S. 292, 296 (1907). In concluding that an exercise of federal equity jurisdiction as to the District respondents was not in order, the Court of Appeals relied essentially on considerations of comity (App. 5a-6a; cf. id. at 3c, n. 2). When these considerations are accorded their proper weight under this Court's decisions, it becomes readily apparent

that petitioners have failed to present a question of exceptional importance calling for the exercise of this Court's certiorari jurisdiction.

This Court has repeatedly made it clear that comity and abstention have special application to situations (such as that here) which give rise to needless conflict between two governmental entities, unnecessary impairment of state or local functions, and needless disruption of the internal administration by a state of its own domestic policy and internal affairs. See *Zwickler* v. *Koota*, 389 U. S. 241, 255-256 (1968) (concurring opinion of Justice Harlan); *Martin* v. *Creasy*, 360 U. S. 219, 224 (1959); *Burford* v. *Sun Oil Co.*, 319 U. S. 293, 298 (1943); *Kiernan* v. *Lindsay*, 334 F. Supp. 588 (S. D. N. Y., 1971, three-judge court), aff'd., 405 U. S. 1000 (1972).

Quite recently in *Rizzo* v. *Goode*, 423 U. S. 362 (1976), this Court discussed the comity principle, which is at the heart of the abstention doctrine, in the context of class-based injunctive relief sought against a local police department. This Court observed that the principle, in addition to precluding federal judicial intervention in pending local criminal and civil proceedings, was also applicable to injunctive challenges to the department's internal affairs (423 U. S. at 380). Surely these considerations are particularly pertinent when the subject matter of the lawsuit involves the internal affairs of another congressionally established court. Cf. *Palmore* v. *United States*, 411 U. S. 389 (1973).

The Court of Appeals understandably refused to enshrine a doctrine that would set up the federal courts of the District of Columbia as the arbiters of the attorney-compensation decisions of the Superior Court of the District of Columbia. An exercise of federal equity jurisdiction, like that sought here, would be likely to impair the ability of the Superior Court to operate with effectiveness which the District of Columbia Court Reform and Criminal

Procedure Act of 1970, 84 Stat. 473 et seq. (hereinafter "the Court Reform Act"), envisions and which has become a practical reality with the benefit of the experience of the past several years. The Congress of the United States has determined that a local court system should have jurisdiction over all local litigation matters, both civil and criminal. In discharging its functions in the latter area, the Superior Court must be able to effectively operate within the framework of its own administrative structure in fixing the compensation of appointed counsel.

Indeed, as the Court of Appeals was quick to note (App. 5a), subsequent to the judgment of the District Court, Congress enacted a separate and independent District of Columbia Criminal Justice Act "for the local courts as part of the District of Columbia Code, with appropriations to be made directly to the District Government." See D. C. Code, 1973, §§ 11-2601 through 11-2609 (Supp. III, 1976). The Court of Appeals went on to observe (id.) that:

> The responsibility for the devolpment and implementation of a plan to provide representation under the new statute falls to the Joint Committee on Judicial Administration of the local D. C. courts. That Committee consists of (1) the Chief Judge of the District of Columbia Court of Appeals, who serves as Chairman, (2) an associate judge of that court elected annually by the judges thereof, (3) the Chief Judge of the Superior Court and (4) two associate judges of that court elected annually by the judges thereof. D. C. Code § 11-1701(a).

Principles of equity and comity dictate that this structure should not be upset by the kind of federal intervention that petitioners seek.

Moreover, since this case involves questions arising in the context of two federally created court systems functioning at the seat of government, petitioners may not avail

themselves of the supplemental federal remedy conferred on state litigants by 42 U. S. C. § 1983. See *District of Columbia* v. *Carter*, 409 U. S. 418 (1973). And 28 U. S. C. § 1331 invoked by petitoners in their amended complaint confers no such absolute remedy. That statute had its genesis in Section 1 of the Judiciary Act of March 8, 1875, 18 Stat. 470, and has been characterized as a post-Civil War measure enacted for the purpose of "providing an impartial forum for the consideration of those federal question cases which might be subject to bias in the *state* courts." Bergmann, *Reappraisal of Federal Question Jurisdiction*, 46 Mich. L. Rev. 17, 29-30 (1947) (emphasis added). It was enacted under Article III of the Constitution as an Act of general application designed to deal with "affairs of national concern." *Lynch* v. *Household Finance Corp.*, 405 U. S. 538, 548 (1972). In this respect, the 1875 Judiciary Act must be contrasted with the Court Reform Act which was enacted pursuant to Article I of the Constitution as an Act of special application designed to improve the District's criminal justice system and create a local judicial system fully equipped to deal with problems like that presented here. *Palmore* v. *United States*, *supra*. It is one thing to say that Congress intended to permit state litigants seeking equitable relief under 42 U. S. C. § 1983 to by-pass a state-created judicial system in favor of seeking a supplemental federal remedy in a District Court. But it is quite a different matter to attribute to Congress a legislative policy whereby petitoners may by-pass one congressionally-created judicial system specifically designed to deal with the acutely local matter involved in order to seek judicial relief in another congressionally-created judicial system designed to deal with matters of national concern under Article III of the Constitution.

Comity considerations aside, petitioners have presented no substantial constitutional issue. Since the representation of the indigent at the call of the court has been a traditional duty of the lawyer upon becoming a member of the bar, the matter of compensation for his appointive services gives rise to no violation of constitutional rights. See *Hurtado* v. *United States*, 410 U. S. 578, 588-589 (1973); *United States* v. *Dillon*, 346 F. 2d 633 (9th Cir., 1965); *Tyler* v. *Lark*, 472 F. 2d 1077 (8th Cir., 1973).

The suggestion made at the outset of this litigation is that the amounts requested by attorneys in their CJA vouchers are reduced by Superior Court judges on a whim, and that the act of cutting dollars has legal significance. Rather, any significance stems from what would be the court's inability to appoint lawyers to represent such indigent defendants requiring CJA representation if the rate of compensation requested by each defense attorney were approved. In FY 1975, the Superior Court identified its need for $2,442,300 in CJA funds, and Congress approved $1,790,000 (73.2%); and in FY 1976, Superior Court needed $3,394,500 and Congress allowed $2,690,000 (79.2%). This year (FY 1977), the Superior Court requested $2,790,000, which Congress cut to $2,290,000 (82.1% of the year's request), a $400,000 (or a 14.9%) cut from the prior year.

Between fiscal years 1975 and 1976 the number of appointments increased some 5.3%. Payments for expert and other services increased in 1976 by more than $45,000 or 31% over the previous year. It is projected that similar program cost increases will persist in 1977 and 1978, meaning an increase of $500,000 over the current budget base is needed to support over 17,000 defense attorney appointments and 1,600 expert and other services.[1]

Because of this tremendous volume, experience has shown it impractical to rely on non-CJA representation. The court was forced to choose between managing CJA funds

[1] Even if it were to receive an increase of $500,000 in FY 1978, the District of Columbia Court System will still face a $700,000 deficiency from the prior years complained of in this litigation.

so that in each case there would be a court appointed attorney in accordance with the constitutional mandate, or, in the alternative, paying every attorney the amount he seeks and ceasing court appointments of lawyers when all CJA funds have been committed. Clearly, the Act is not designed to provide full compensation for counsel. *United States* v. *Harper,* 311 F. Supp. 1072, 1074 (D. D. C., 1970, Bazelon, C. J.); *United States* v. *James,* 301 F. Supp. 107 (W. D. Tex., 1969). See also *Tyler* v. *Lark, supra,* 472 F. 2d at 1080; cf. *United States* v. *Hunter,* 394 F. Supp. 997 (D. D. C., 1975), 385 F. Supp. 358 (D. D. C., 1974); *United States* v. *Thompson,* 361 F. Supp. 879 (D. D. C., 1973), vacated in part and affirmed in part without opinion, 489 F. 2d 1273 (D. C. Cir., 1974). The only rational solution and the one the court adopted was for each judge to exercise good administrative judgment in a case-by-case approach. This approach was neither inappropriate nor illegal.

The CJA provides that an appointed attorney is to "be compensated at a rate *not exceeding* $30 per hour for time expended in court * * * and $20 per hour for time reasonably expended out of court" (18 U. S. C. § 3006A(d)(1); emphasis added). But the $20 and $30 figures, consistent with the Act's terms, are merely intended to serve as compensation guidelines or outer limits, not mandatory amounts which are *ipso facto* translated into property interests upon the performance of legal services. The authority for issuing rules and regulations governing the operation of plans formulated under the CJA is vested in the Judicial Conference of the United States (18 U. S. C. § 3006A(i)). The CJA guidelines approved by the Conference state that "the hourly rates of compensation are designed and intended to be maximum rates and to be treated as such."[2] However, since the CJA guidelines are

[2] Guidelines, ch. II(B)(3)(a). These guidelines are appended to the Report of the Committee to implement the Criminal Justice Act of 1964, which was approved by a special session of the Judicial Conference of the United States on January 13, 1965.

devoid of additional pronouncements as to what constitutes "fair compensation" under the Act—cf. *United States* v. *Thompson, supra,* 361 F. Supp. at 886-887—this bare statement provides a judge with little more than an outside parameter within which to exercise his discretion. With little or no guidance emanating from Congress or from the body established to issue rules and regulations governing the operation of plans formulated under the CJA, it was unrealistic to demand that the Chief Judge of the Superior Court fashion across-the-board standards for the fixing of compensation in local CJA cases. Moreover, even if a set of standards were promulgated by the Chief Judge, they would necessarily be subjected to reevaluation, revision and recission in light of the predictably tenuous funding status of CJA appropriations.

Nonetheless, petitioners (petition at 15-18) urge that this Court should exercise its certiorari jurisdiction in order to consider essentially whether, in cases disposed of without trial,[3] a reduction of compensation below the $20 and $30 figures requires a hearing in accordance with the doctrine of *Perry* v. *Sindermann,* 408 U. S. 593 (1972). In that case, this Court held that a state college system could not decline to renew a professor's employment without affording him an opportunity to be heard, given "rules and understandings promulgated and fostered by state officials" and supportive of his contractually oriented claim to job tenure. This Court deemed crucial to procedural due process protections the existence of a property interest, as opposed to a mere subjective expectancy (408 U. S. at 602-603). And

[3] In cases in which trials actually occur, of course, the presiding judge is best qualified to determine the amount of compensation to be paid appointed counsel and, in fact, does so under Superior Court practice. However, in cases disposed of without trial, the "Judge in Chambers" makes the compensation determination under a system designed to achieve "both savings and uniformity" in contrast to an earlier system "which indiscriminately assign[ed] the voucher to the judge who last had contact with the case." See Exhibit A, *infra,* at 3-4.

in *Board of Regents* v. *Roth*, 408 U. S. 564, 577, a companion case to *Perry* decided the same day, this Court stated that:

> Certain attributes of "property" interests protected by procedural due process emerge from these decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. • • •
>
> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. • • •

See also *Bishop* v. *Wood*, —— U. S. ——, 96 S. Ct. 2074 (1976).

This case, in contrast to *Perry*, involves no property interests whatever, as the CJA confers no vested right to compensation at the $20 and $30 per hour rates. Although petitioners assert (petition at 16) that there is a "mutual understanding that lawyers who take cases under the Act will be compensated" at these hourly rates, nothing in the record supports the existence of such an understanding and the CJA guidelines approved by the Judicial Conference point the other way. And since any such arrangement would be inconsistent with the letter and spirit of the CJA as well as the guidelines approved by the Judicial Conference, it would be completely lacking in validity under the established principle that a governmental entity can incur no contractual obligations beyond the scope of the statutory and regulatory guidelines governing its area of operations.

Clearly therefore, since petitioners can point to no property interest of a statutory or contractual nature, their argument that they were entitled to a hearing as a prerequisite to reduction of their claimed compensation under the CJA is totally without substance. Or, as the Court, in speaking of that very Act, recently stated in *United States* v. *Durka*, 490 F. 2d 478, 480 (7th Cir., 1973), "• • • [t]he fixing of compensation • • • pursuant to 18 U. S. C. § 3006A(d) • • • is not such an event that requires the procedural safeguards of an adversary hearing. Morrissey v. Brewer, 408 U. S. 471, 481, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972). • • •"

CONCLUSION

Upon the foregoing, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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EXHIBIT A

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

MEMORANDUM TO THE JUDGES

Upon the recommendation of the Criminal Justice Act Committee and with the concurrence of the Board of Judges, the Committee's recommendations are hereby adopted as the policy of the Court. These reforms constitute the latest in a series of efforts the Court has made to reduce Criminal Justice Act expenditures while at the same time continuing to offer indigent criminal defendants high quality defense services. Most notable of the earlier steps in this direction was the Board of Judges Resolution of May 19, 1972, by which the compensation of individual attorneys from Criminal Justice Act funds was limited to $18,000 a year. It is hoped that the new measures announced today will produce annual savings of between $100,000 and $200,000.

1. Assignment of Pretrial Diversion Cases to Third-Year Law Students

All adult cases which qualify for pretrial diversion, and in which that fact is apparent at the time of prosecutorial papering, will be assigned to third-year law students rather than to CJA attorneys. It should not prove to be difficult to implement this measure inasmuch as the U. S. Attorney's Office identifies all such divertible cases at the time of papering.

All juvenile consent-decree cases will likewise be assigned to third-year law students. Implementation of this procedure may be somewhat more difficult because the Corporation Counsel presently does not decide whether to handle a case on a consent-decree basis until the time of trial. To overcome this problem, the Corporation Counsel

has been urged to designate those cases in which a consent-decree will be ordered at the earliest practicable time in as many cases as possible.

2. **Increasing Defendant Contributions to CJA and Requiring Direct Payments to Attorneys**

a. Unless extraordinary countervailing reasons exist, judges should approve orders for defendant contributions to CJA whenever the CJA Office recommends that such orders be entered. With the cooperation of all the judges, it should be possible to increase contributions to an annual level of about $100,000. The use of installment plan payments can help make increased contributions possible without imposing undue hardships on defendants and their families.

b. When defendant's contributions are ordered, judges should direct that the contributions be paid directly to the attorneys involved. The CJA Office will then record on the voucher that a contribution has been ordered, as well as the amount of the contribution. The amount so recorded will then be deducted from the attorney's CJA claim, whether or not the attorney succeeds in collecting the contributions. This procedure is in contrast to the present practice of ordering that contributions be paid to the Court. Payments that are made to the Court must be transferred to the U. S. Treasury, and they are not credited specifically to the fund set aside for the District of Columbia. Additionally, it appears that under the present system, only a fraction of ordered payments are collected. Under the new system, the appointed attorney will himself be responsible for collecting the contribution, and the ordered amount will be deducted from any claim. Not only should the rate of collections be increased, but CJA monies will also be conserved by the gross amounts of contribution orders.

3. **Updating Contribution Orders to Sentencing Date**

Under the present system, only one appraisal is made of the defendant's financial condition, that is, on the day of arraignment, or for juveniles, at the time of initial hearing. However, in many instances, a defendant or respondent may acquire employment after his initial eligibility interview, his salary may increase, or errors may be discovered in the original information. Any of these factors may affect the justifiable amount of the contribution he should be called upon to make, but none has heretofore been recorded.

Hereafter, in any adult criminal case ending in conviction, or any juvenile case in which the respondent is adjudicated involved, the Division of Social Services, will, as part of its presentence investigation, determine whether any change has occurred in the financial condition of the defendant or respondent since his initial court appearance. Any such change will be reported to the CJA Office which may then recommend appropriate adjustments in the contribution. The Division of Social Services will also submit recommendations on the feasibility of obtaining similarly updated financial information in cases that end in dispositions other than conviction.

4. **Unitary Approval of Vouchers in Non-Felony Cases Involving Disposition Without Trial**

In all non-felony cases which end in dispositions without trial, a single judge will examine all CJA vouchers to determine whether the amounts requested ought to be revised downward. This duty is hereby assigned to the Judge-in-Chambers for January 1973. Depending upon the workload, this assignment may be shifted in subsequent months to other Sections.

The need for this move is made apparent by November 1972 figures compiled by the CJA Office which show that individual judges made relatively few downward adjust-

ments in the vouchers submitted to them. In felony cases under the individual assignment system, and in a misdemeanor or juvenile cases that go to trial, the trial judge is still the person best equipped to pass on the vouchers, if he does so critically. However, in non-trial dispositions, the new system should prove more effective in achieving both savings and uniformity than the present system which indiscriminately assigns the voucher to the judge who last had contact with the case.

Harold H. Greene
Chief Judge

January 3, 1973